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FAX TRANSMISSION COVER SHEET

Jenuery 23, 1996

CODE: 558.0

Sue McNeil

FAX NO .: 634-7651

Mike Sullivan

RE:

Re PCS 2000 incorrect bid for 8324, enclosed are copies of PCS 2000's printouts of (1) the bids the company believes were uploaded to the FCC in Round 11; (2) the company's database file of its active bids as of Round 11; and (3) the company's database file of all markets. These were previously sent to Louis Segalos.

HER OF PARKS: __14_... INCLUDING THIS FRIVER HAI PLEASE DELIVIES ID ADDRESSES IMMEDIATELY. THIS FAX WAS SENT BY:

TRANSMISSION REPORT

THIS DOCUMENT WAS CONFIRMED (REDUCED SAMPLE ABOVE - SEE DETAILS BELOW)

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TELEPHONE (202) 783-4141

FAX (202) 833-2360 (202) 783-5851

FAX TRANSMISSION COVER SHEET

DATE:

January 25, 1996

CODE: 558

To:

Javier Lamoso, Fred Martinez, FAX No.: 1-415-349-8150

Terry Easton, & Quentin Breen

FROM:

Mike Sullivan

RE:

Redraft of waiver request. It is very important that we file as soon as possible in order to (a) reassure the FCC and (b) meet press deadlines. Please call as soon as you have reviewed this and fax the executed declarations.

NUMBER OF PAGES: ____, INCLUDING THIS COVER SHEET. PLEASE DELIVER TO ADDRESSEE IMMEDIATELY. THIS FAX WAS SENT BY: ____

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GERMAN OFFICE GOETHESTRASSE 23

603I3 FRANKFURT A.M., GERMANY 0II-49-69-20876

011-49-69-297-8453 (TELECOPIER)

January 26, 1996

William F. Caton, Acting Secretary Federal Communications Commission 1919 M Street, N.W., Room 222 Washington, D.C. 20554

Re:

TELECOPIER

(202) 783-5851

(202) 833-2360

PCS 2000, L.P.

Block C PCS Auction

Request for Expedited Waiver or Reduction of Withdrawal Penalty

Attention:

Kathleen Ham

Chief, Auction Division

Wireless Telecommunications Bureau

Dear Mr. Caton:

On January 23, 1995, PCS 2000, L.P. ("PCS 2000") erroneously submitted a bid in the Block C PCS auction for Market B324 for a price ten times as high as it intended. It informed the Commission immediately upon discovering the error and withdrew the bid the next day. PCS 2000 now asks the Commission to waive its withdrawal penalty rule. Imposing a penalty potentially as large as \$162 million on PCS 2000, a small business owned and controlled by women and minorities, for an innocent error will both destroy the company's ability to continue its aggressive participation in the auction and chill the willingness of other small businesses and entrepreneurs to bid.

Accordingly, PCS 2000 requests, pursuant to Section 24.819(a)(1) of the Rules, a waiver of the bid withdrawal penalty imposed by Section 24.704(a)(1) of the Rules for PCS 2000's withdrawal of its erroneous high bid of \$180,060,000 for the Block C license in Market B324 in Round 11. In the alternative, PCS 2000 requests that the penalty be very substantially reduced. PCS 2000 respectfully requests that action be expedited so that a resolution is achieved while the auction is ongoing. Delaying action until after the close of the auction would adversely affect the outcome of the auction.

Background

In Round 11 of the Block C PCS auction, PCS 2000 entered bids for a number of markets, including Market B324. For each of these selected markets, PCS 2000 intended to, and believed at the time that it did, enter the minimum bid increment. For Market B324, the minimum bid increment would have resulted in a bid of \$18,006,000.00. Due to an error, the bid for this market was recorded by the Commission as \$180,060,000.00, exactly ten times as large as the intended bid. PCS 2000 discovered the error about two hours after the close of the bidding for Round 11, when it downloaded the round results from the FCC's internet FTP server. PCS 2000 immediately telephoned the FCC's auction contractor to indicate that it had intended to bid \$18,006,000.00 and to report that the \$180,060,000 bid was in error. Undersigned counsel also contacted officials of the Auction Division to inform them of the error. The Commission verified that the bid had been posted as received, and PCS 2000 withdrew the erroneous high bid of \$180,060,000.00 on January 24, 1996.

PCS 2000 has conducted a preliminary investigation of the error, but the precise cause of the erroneous bid remains unknown. The error appears to have occurred in PCS 2000's bid preparation and submission process and was likely caused by some combination of a departure from previously established internal procedures, human error, and the inability to conduct a complete cross-check of the submitted bids against other data prior to the conclusion of the bidding period because of a lack of time. In addition, discovery of the error was delayed because the FCC's confirmation of the bid was not received due to a printer malfunction. PCS 2000 is undertaking measures to ensure that there is no recurrence of these conditions.

PCS 2000 notes that some press reports have erroneously claimed that PCS 2000 attributes the error to the Commission. Because the results reported by the FCC did not reflect the bid that PCS 2000 believed it had submitted, the company contacted the FCC to determine whether an error had occurred in reporting the results. The FCC confirmed that it reported the results that had been submitted, and PCS 2000 has now concluded, as discussed above, that the error occurred in its own bid preparation and submission process and was *not* attributable to the Commission.

Discussion

PCS 2000 submits that the public interest would be served by grant of a waiver (or, in the alternative, a substantial reduction in the penalty) in the unique circumstances of the instant case, that strict application of the prescribed penalty for withdrawing a bid would disserve the public interest, and that the purpose of the rule would not be undermined by a waiver. Prompt resolution of this is essential, because the lack of a decision will severely limit the ability of PCS 2000 to continue its active and aggressive participation in the auction and could aversely affect the willingness of other bidders to participate.

Waiver of the penalty rule under these circumstances would not establish a precedent that would create any opportunity for mischief in the future. The bid submitted in error by PCS 2000 was clearly in error and not an attempt to manipulate the bidding. The \$180,060,000.00 bid represented a per-pop price of \$110, which is vastly in excess of the likely value of this license. Indeed, the erroneous bid exceeded the previous high bid by 900%, at a time when PCS 2000 (and many other bidders) were making only the minimum bids necessary. All of PCS 2000's bids in Round 11, except the erroneous bid for Market B234, were the minimum permissible bid, and the erroneous bid was exactly ten times the minimum permissible bid of \$18,006,000.00. It is obvious that an extra zero was somehow accidentally added to the end of the bid amount. No reasonable bidder would have knowingly bid such a price for this license.

PCS 2000 promptly took steps to notify the Commission that an error appeared to have occurred. As Mr. Easton indicates in his declaration, immediately upon discovering that the FCC had recorded the bid as being \$180,060,000.00, he informed Mr. Louis Segalos, an official with the Commission's auction contractor, that an error had occurred. He supplied Mr. Segalos with copies of spreadsheet printouts indicating the bids that PCS 2000 believed it had submitted. Shortly thereafter, counsel informed the Auctions Division staff of the error. The erroneous bid was then withdrawn on January 24, 1996.

The Commission adopted its bid withdrawal penalty rules to deter "[i]nsincere bidding, whether purely frivolous or strategic." Competitive Bidding, PP Docket 93-253, Second Report and Order, 9 F.C.C.R. 2348, 2373 (1994). Allowing the prompt withdrawal of a clearly erroneous bid without penalty will have no effect on the Commission's ability to penalize those who submit frivolous bids or bids that are part of a manipulative strategy. There is no indication in the Second Report and Order that the Commission intended to impose the bid withdrawal penalty on those who withdraw bids that were clearly submitted in error.

Moreover, the level of the bid withdrawal penalty that the Commission adopted was specifically selected in order to take advantage of marketplace incentives by bidders who would consider the penalty as a price component. The Commission never considered the possibility that a bid might be submitted in error for many times the market value of the license. The Commission stated:

A point to note in considering the appropriate level of bid withdrawal penalty is that the market generally places an upper limit on the amount that bidders will pay to the government for bid withdrawal. If the bid withdrawal penalty is too high, winning bidders who realize they bid too much will generally pay for the license and resell it in the after-market. The cost of doing this would be the difference between the bid price and the price obtained in the after-market.

9 F.C.C.R. at 2373. These economic calculations are relevant only to the intentional submission of an excessive bid and its subsequent withdrawal, not to the withdrawal of a bid erroneously submitted for an amount ten times as high as intended.

In establishing the bid withdrawal penalty, the Commission was particularly sensitive to the financial circumstances of designated entities, who it noted "are less likely to have the option of purchasing a license and reselling it as an alternative to bid withdrawal." *Id.* In the case of a grossly excessive bid submitted in error, a capital-constrained designated entity can neither buy the license at the bid price for resale nor pay a penalty amounting to many times the value of the license. It is noteworthy in this connection that the Commission recognized that "requiring the forfeiture of all funds on deposit with the Commission could, in some cases, be too severe a penalty." In the instant case, the funds PCS 2000 has on deposit (which constitute the majority of PCS 2000's assets) would cover only a fraction of the penalty. Forfeiture of these funds would render this designated entity unable to pay for *any* licenses for which it may be the high bidder. Thus, application of the rules would have a result directly contrary to the purpose for which the rules were adopted.

None of the participants in the C Block auction would be able to pay a penalty of this magnitude. It would vastly exceed the \$50 million upfront payment posted by PCS 2000 (and indeed would exceed any Block C bidder's upfront payment) and would, if not waived, render the company unable to acquire any licenses. Other bidders in the auction would be similarly affected by a penalty were they to make a similar mistake. Prompt action on this matter is needed to avoid chilling participation in the auction.

It is important to recognize that if PCS 2000 is subjected to this unduly burdensome penalty, its bidding capacity will be drastically reduced, if not eliminated. As a result, less money will be involved in the auction and licenses may well be undervalued. This would lead to spectrum being assigned on a less than optimal economic basis, instead of being assigned to those valuing most highly. A prompt waiver of the rule would ensure the integrity of the auction process as a whole and minimize any disruption to this process.

PCS 2000 regrets that the error occurred. Nevertheless, no party has suffered any harm as a result of the erroneous bid or its withdrawal. The error occurred relatively early in the auction and the bid was promptly withdrawn. As a result, any party wishing to bid for the market involved is able to do so.

In the event the Commission does not waive the withdrawal bid penalty rule entirely, PCS 2000 respectfully requests that the penalty be reduced very substantially. The Commission never anticipated that a bidder might be subjected to a penalty vastly exceeding the value of the license for which it had bid. A bidder who engages in strategic bidding to close out another bidder and then withdraws its bid will be liable for a penalty that represents a small fraction of the license's value. No public interest would be served by imposing a far greater penalty on a bidder who withdraws an erroneous bid. The Communications Act does not contain specific provisions governing the

penalties that may be imposed as part of the auction process, but the provisions of Section 503 concerning monetary forfeitures for serious violations of the Act place a limit of \$100,000 on the penalty that may be assessed for any single violation by a common carrier. See 47 U.S.C. § 503(b)(2)(B). It would clearly be inappropriate to impose a greater penalty for withdrawal of an erroneous bid than for willful violation of the Communications Act.

Accordingly, PCS 2000 submits that waiver of the rule (or, in the alternative, a substantial reduction in the bid withdrawal penalty) is warranted in the public interest and should be granted without delay.

Sincerely,

Wilkinson, Barker, Knauer & Quinn

By: Michael Deuel Sullivan

Counsel for PCS 2000, L.P.

cc: Kathleen O'Brian Ham Gerald P. Vaughan

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WILKINSON, BARKER, KNAUER & QUINN

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OUSTANARTURE AM GERMANT

011 49-69-297-4463 ITELECOPICRI

May 23, 1996

VIA FACSIMILE

TELLCUMEN

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Tony J. Tanke, Esquire Fax: 415-591-8635

Ms Dorothy Lentz Fax: 415-347-8255

Dear Mr. Tanke and Ms. Lentz:

I am writing you on behalf of PCS 2000, L.P., as its FCC counsel. I have received from Mr. Javier O. Lamoso and Mr. Fred H. Martinez copies of (1) a letter dated May 17, 1996 from Ms. Lentz and (2) an undated letter from Mr. Tanke. These were received at Mr. Martinez's office on May 22, 1996. Ms. Lentz's letter purports to have accepted, effective May 17, 1996, Mr. Lamoso's March 1, 1996 proposed resignation as the trustee of the SDE Trust and names Sandra Tozzini, Esquire as the new trustee.

You may not be aware of the potential consequences for PCS 2000's FCC applications if the May 17 letter is deemed to be effective. Specifically, there is a danger that this would result in dismissal of PCS 2000's applications. On May 17, PCS 2000 had not yet filed its "long form" applications on FCC Form 600; thoso were filed on May 22. As of May 17, the only application PCS 2000 had filed was its "short form" application on FCC Form 175. To the extent that application is deemed by the FCC as pending on May 17—which is an open question—it would have to be amended to reflect the substitution of the trustee. See 47 C.F.R. §§ 24.813(b)(2), 1.65. However, the FCC's rules also provide, in 47 C.F.R. § 24.822(b), that with respect to Form 175 applications,

Amendments which change control of the applicant will be considered major amendments. An FCC Form 175 which is amended by a major amendment will be considered to be newly filed and cannot be resubmitted after applicable filing deadlines.

In other words, to the extent that (1) the Form 175 remained pending on May 17 and (2) an amendment to substitute Mr Lamoso as trustee on May 17 reflects a change in control of PCS 2000.

it will cause PCS 2000's application to be considered newly filed after the November 6, 1995 filing deadline for Form 175 applications and therefore defective, resulting in dismissal.

There is a considerable possibility—indeed perhaps even likelihood—that the FCC will consider the Form 175 to have been pending on May 17, because the Form 600 had not yet been filed. While I believe the opposite position has considerable merit—namely, that the Form 175 has ceased to serve its purpose as an application to participate in the auction once the auction is over, and is therefore no longer pending—there can be no certainty how the FCC would rule, and its interpretation of its own rules will receive substantial deference in court.

There is also a possibility that the FCC would view a substitution of Mr. Lamoso as the trustee of the SDE Trust as a transfer of control. The FCC's rules and policies concerning attribution of interests held in trust are subject to varying interpretations, but the FCC has in many contexts considered a trustee as an attributable interestholder. Because Mr. Lamoso is also the trustee of other trusts, as well as the SDE Trust, and as a result had the power to vote a majority of the stock in Unicom Corporation, the FCC could well come to the conclusion that Mr. Lamoso held de jure control of Unicom and thereby of PCS 2000. If this were the case, removal of Mr. Lamoso as trustee would reduce the number of shares of stock that he votes below 50%, which the FCC could view as resulting in a transfer of control of PCS 2000, which is not permissible while the Form 175 is pending.

Once the Form 600 has been filed, matters change. At this point (i.e., after May 22), not all transfers of control result in the application being considered newly-filed and therefore subject to dismissal. Rather, the FCC's rules provide that a "substantial" change in control is a "major" amendment, which results in a new public notice and opportunity for public objections, unless it reflects a change in control that has been approved by the Commission. See 47 C.F.R. § 24.823(c), (g)(3), 24.827(a). Thus, there is much less danger of summary dismissal of the applications in the case of a transfer of control if it occurs after the Form 600 has been filed. Nevertheless, there remains a danger that a change in control after the Form 600 is filed, if deemed "substantial," could have significant detrimental effects on PCS 2000's applications, perhaps even including dismissal or denial of the applications.

In this connection, we wish to point out that on March 8, 1996, James A. Lassart, Esquire, wrote to Mr. Lamoso to inform him on behalf of Susan D. Easton and Ms. Lentz that Mr. Lamoso's March I letter stating his intent to withdraw as Trustee "is not approved" and that Ms. Lentz, Ms. Easton, and the Trustor "reject any attempt" by Mr. Lamoso to withdraw. Mr. Lassart's letter made clear that Ms. Lentz would not consider Mr. Lamoso's proposal to withdraw as Trustee unless Mr. Lamoso provided certain opinions and assurances, which he has not subsequently provided.

In our view as counsel for PCS 2000 (and not as counsel for the Trustee or the SDE Trust), Mr. Lassart's letter appears to negate the existence of any continued offer by Mr. Lamoso to withdraw or resign as the Trustee, thus calling into question whether Ms. Lentz's May 17 letter

purporting to "accept[]" Mr. Lamoso's "resignation" was legally effective. If you share this view, and confirm in writing that the May 17 letter did not have the legal effect of replacing Mr. Lamoso as Trustee, any potential FCC problem due to a transfer of control during the pendency of the Form 175 could be avoided. This could be accomplished without in any way prejudicing Ms. Lentz's ability to exercise her rights as the Trust Protector to designate a substitute trustee in the future. In this connection, Mr. Lamoso has indicated to me that he is willing to give you any necessary assurances that he will not take any action as Trustee concerning the SDE Trust's interest in Unicom and PCS 2000 without advance consultation.

While the Deed of Trust, which I have not reviewed, may give Ms. Lentz the unrestricted right to replace Mr. Lamoso as Trustee, I must strongly urge, as FCC counsel to PCS 2000, that any such action he taken after due consideration of the FCC consequences. I would highly recommend that before any action under consideration be taken it be passed upon by FCC counsel to Ms. Lentz and Ms. Easton, and I would urge that PCS 2000's FCC counsel be given an opportunity to review any proposed action. In addition, it would be highly advisable that any action be discussed in advance with appropriate FCC staff officials.

As you may be aware, the FCC is currently considering designating PCS 2000 for a hearing. A recent Televommunications Reports article quoted Jerry Vaughan, the FCC's deputy wireless bureau chief, as stating that a draft hearing designation order was being reviewed (copy attached), and I confirmed this fact with Mr. Vaughan on Monday. Such a hearing could have disastrous consequences for PCS 2000 and all its investors, including the SDE Trust and its beneficiary, Ms. Easton. It would be prudent to avoid creating further issues that might compound the difficulties that PCS 2000 finds itself in at the FCC. Accordingly, I would like to invite Mr. Tanke to join with members of my firm for a meeting with FCC staff officials to discuss the FCC's view of the issues and how various transactions might affect the agency's handling of the case.

Sincerely,

WILKINSON, BARKER, KNAUFR & QUINN

By: Michael Deuel Sullivan

Attachment

FCC Denies Waiver for PCS License Down Payment, Plans To Reauction Licenses

The FCC has denied a rule waiver request submitted by BDPCS, Inc., which failed to make the required 5% down payment last week for 17 licenses it won in the recent "C" block PCS (personal communications service) auction. In a statement released Friday, Michele C. Farquhar, Chief of the Wireless Telecommunications Bureau, said, "We are prepared to deal quickly and fairly with defaults and put licenses in the hands of the companies that will provide service to the American public." She added that "auctions are a market-oriented process, and defaults are a reality in the marketplace. We offer no guarantee of success, only the opportunity to compete." FCC officials said BDPCS' licenses probably will be reauctioned this summer when PCS licenses for the "D," "E," and "F" spectrum blocks are put up for sale.

Meanwhile, another PCS auction participant—National Telecom PCS, Inc.—has requested a waiver of the "bid withdrawal penalty" rule, claiming that it should not be fined for placing mistaken bids. In addition, the FCC's Billing and Collections Branch has not yet been able to record the down payment of another bidder. But that company (whose name has been withheld) has informed the FCC that it did submit the requisite deposit last week, FCC sources said. The "defaulted" payments could result in a shortfall of more than \$50 million, they said, noting that the Commission had expected to collect between \$250 million and \$260 million last Wednesday from 31 companies that recently won PCS licenses (TR, March 13).

Altogether, 89 companies won licenses, but 58 already have satisfied their initial financial obligations to the federal government through deposits made before the C block license sale began last December, FCC sources explained. Officials in the wireless bureau expected to release a public notice regarding the down payments sometime this week.

Under Commission rules, the 5% down payments were to be made by midnight May 15 in the form of wire transfers or deposits of cashier's checks. In a May 8 public notice, the FCC stated, "If a winning bidder fails to submit the required down payments by Wednesday, May 15, 1996, the bidder will be deemed to have defaulted, its [license] application will be dismissed, and it will be subject to the default payment specified in sections 1.2104(g)(2) and 24.704(a)(2) of the Commission's rules."

The notice continued, "The defaulting bidder will be required to reimburse the Commission in the amount of the difference between its net winning bid and the amount of the winning bid the next time the license is offered, if the subsequent winning bid is lower." An additional penalty of 3% of the winning bid or the defaulting bid—whichever is less—also will be imposed.

In its "emergency petition for waiver" submitted last Wednesday, BDPCS requested a 30-day extension to fulfill its financial obligations to the government. BDPCS, whose major investors include Samsung Electronics Co. Ltd. and Dacom Corp., bid nearly \$874 million for 17 PCS licenses. But the company failed to make a deposit of almost \$37 million last week because its parent company, Quest-Com, Inc., was unable to obtain a bridge loan from U S WEST Communications, Inc., BDPCS explained.

QuestCom intended to repay the loan after completing an initial public offering "that was to take place while BDPCS' C block license applications were pending," BDPCS told the FCC. The funds obtained from the IPO were to be used to repay U S WEST and satisfy BDPCS' remaining down payment obligations, BDPCS said in its waiver request. It explained that the "Chairman of U S WEST vetoed any bridge loan to QuestCom because of a purported conflict with noncompetition clauses in a prior agreement U S WEST has with another party." Merrill Lynch & Co. also withdrew its commitment to serve as lead underwriter for BDPCS's IPO, further jeopardizing the company's ability to meet its financial obligations, BDPCS said in its waiver request.

It explained that "the Merrill Lynch personnel that had been working on the QuestCom [IPO] abruptly left Merrill Lynch to take a position with...another high bidder in the PCS C block auction. Merrill Lynch consequently refused to honor its written commitment to QuestCom to serve as lead underwriter for QuestCom's [IPO]...After meetings with QuestCom, a number of investment bankers expressed an interest in acting as lead underwriter for QuestCom, subject to completing their analyses of the company. The results of these analyses were not available until May 13, and Bear, Stearns was chosen as lead underwriter."

For the last few weeks, BDPCS has sought additional sources of financing. It reported in its waiver request that a "last-minute agreement among U S WEST, Samsung, and Questcom was reached but not approved by the top management at every company involved." It said it could make its post-auction payment to the FCC if a 30-day extension were granted.

Meanwhile, National Telecom PCS (NatTel), which submitted a net high bid of \$411,000 for a PCS license covering American Samoa, has asked for a waiver of the bid-withdrawal penalty rule. According to a May 8 FCC public notice, NatTel is liable for \$101,620 in bid withdrawal payments. But the company disputed the amount in its May 14 waiver request. It said, "An administrative assistant incorrectly and mistakenly entered bids for certain licenses after having misunderstood instructions given to her from NatTel's principals, both of whom were traveling and out of the office at the time" the mistaken bids were placed.

The company said such an error occurred twice, with bids being placed for markets NatTel had no interest in serving, including Williston, N.D., and Dodge City, Kan. NatTel said it immediately withdrew the bids when the errors were discovered. It said no payments for the mistaken bids should be required. "Alternatively, if such payment is to be required, the amount should be substantially less than that referenced in the public notice," it said. If the penalty payments are excluded, NatTel believes it has satisfied its license down payment requirements; it already has \$50,000 on deposit with the Commission.

Separately, FCC officials told TR that they are conducting a formal investigation into the factual circumstances surrounding an allegedly erroneous bid placed by PCS 2000 L.P. earlier in the C block auction. In Round 11, PCS 2000 bid \$180 million for a license covering the Norfolk, Va., market. It later withdrew that bid and told the FCC it had intended to bid \$18 million for the license. It subsequently requested a waiver of the bid withdrawal penalty (TR, Jan. 29). The company later amended that waiver request.

PCS 2000 "eliminated a couple of sentences [in the original waiver request] that were not entirely correct," explained Michael Sullivan, an attorney representing the company. In addition, an affidavit of PCS 2000 Chief Executive Officer Anthony Easton that accompanied the waiver request also was eliminated, Mr. Sullivan said. "There were simply some incorrect statements that we did not want included in the waiver request," he told TR. Mr. Easton has since resigned from PCS 2000, Mr. Sullivan reported. PCS 2000's President, Javier O. Lamoso, confirmed this fact in a formal declaration submitted to the FCC in February. Mr. Sullivan also told TR that PCS 2000 has been subpoenaed by the FCC, which is seeking documents pertaining to the alleged bidding error.

Gerald P. Vaughan, Deputy Chief of the wireless bureau, told TR that the FCC is withholding PCS 2000's up-front payment of \$50 million and will not require further payments from the company until issues surrounding the "amended waiver request" are resolved. The FCC made a similar statement in a footnote in the public notice announcing the close of the C block auction. Mr. Vaughan said the Commission's staff is reviewing the draft of a hearing designation order that is expected to be adopted in the next week or two. "In all probability we will go to a hearing," he told TR. "This is likely to be a year-long proceeding" in which an administrative law judge will determine whether PCS 2000 may have misrepresented the facts regarding its alleged bidding error, Mr. Vaughan said.

LUKAS, McGOWAN, NACE & GUTIERREZ

CHARTERED

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June 28, 1996

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WRITER'S DIRECT DIAL (202) 828-9470

Chairman Reed E. Hundt Federal Communications Commission 1919 M Street, N.W., Room 814 Washington, D.C. 20554

Re: PCS 2000, L.P., Block C Applicant

Dear Chairman Hundt:

On behalf of Anthony T. Easton, we write to you regarding the referenced matter (identical letters are being sent to each of the Commissioners). We write to urge that the Commission not make any judgment with respect to the licensing of PCS 2000, L.P. ("PCS 2000") on any basis other than those facts included in the public record surrounding the applications themselves and an overbid submitted by the applicant, consistent with applicable law and policy being applied to them. We also write to supplement the record in this proceeding.

As has been well chronicled, in Round 11 of the C Block auction, PCS 2000 submitted a bid of approximately \$186 million when it intended to bid \$18.6 million. Mr. Easton was the PCS 2000 bidding official in charge when this error transpired, and his actions have become the focus of concern involving the overbid and related matters. We believe this error is manifestly nothing more than an inadvertent one and should be treated accordingly. This is especially so in view of the fact that Mr. Easton, who has repeatedly admitted his error, is no longer a director of PCS 2000 and is in no way affiliated with PCS 2000. For reasons we do not fully understand, considerably more is being made of this error. Mr. Easton has not had the opportunity to be present when various charges have been presented against him on an ex parte basis regarding this matter. Yet, we know that a host of former

political appointees have paraded themselves before staff in an effort to influence the outcome of this proceeding and we understand that persons both within PCS 2000 itself, and outside of PCS 2000, have attempted to paint Mr. Easton as having intentionally deceived the Commission with respect to this bid $^{\frac{1}{2}}$ -all to benefit their transparent self interest, while no doubt claiming to be assisting to the Commission in one way or another. We are hopeful that the Commission will focus on the facts and not be taken in by $\underline{\text{ex}}$ $\underline{\text{parte}}$ communications or other off-record argument.

We write to each of the Commissioners because of the critical importance of this matter and in order to provide directly to the Commissioners Mr. Easton's position prior to this matter becoming restricted. We also do so because, despite courtesies afforded to Mr. Easton and the undersigned by the Office of General Counsel and the Wireless Telecommunications Bureau, we remain unaware of what specific charges have been presented against Mr. Easton and what proposals have been made which may otherwise affect Mr. Easton, all in <u>ex parte</u> meetings. We are also uncertain where (i.e., at what level) this matter is being considered within the Commission.

All that we ask is that this matter be decided on its merits, on the record, and with due process being accorded to all interested persons. We have reviewed articles in industry publications that reflect what appear to be certain prejudgments that certain members of the staff have already made regarding PCS 2000. A copy of one such article is enclosed. (Another article, which identifies a particular staff person as having made comment that the PCS 2000 applications will be designated for hearing is not submitted herewith, in fairness to that official and in recognition that he may have well been misquoted.) In addition, we understand that representatives of PCS 2000 have presented certain proposals to the staff, which proposals they urge should permit grant of the PCS 2000 application.

While we understand (from the staff) that the staff has at no time advised PCS 2000 of any pre-conditions to a grant of the PCS 2000 applications, representatives of PCS 2000 have repeatedly advised Mr. Easton that the staff has stated that the PCS 2000 applications can be granted only if neither Mr. Easton nor his wife

It is clear that Mr. Easton did not make any misrepresentation to the Commission. Commission precedent makes clear that a misrepresentation is "an intentional misrepresentation of fact intended to deceive". Swan Creek Communications, Inc. v. FCC, 39 F.3d 1217, 1222 (D.C. Cir., 1994) (citing Silver Star Communications-Albany, Inc., 3 FCC Rcd 6342, 6349 (Rev. Bd., 1988).

have any continuing involvement in the applications. $^{2/}$ Not coincidentally, under PCS 2000's scenario, non-Easton parties within PCS 2000 would reap a financial windfall if their proposal is accepted.

We ask that whatever decision the Commission makes not be dictated by <u>ex parte</u> presentations presented by parties having interests adverse to Mr. Easton's. We also trust that the decision will be based only upon review of appropriate facts and application of governing law. In order to facilitate the Commission's consideration of these matters, we have enclosed herewith (a) an affidavit of Mr. Easton that provides pertinent facts regarding the overbid itself, and (b) a transcript of Mr. Easton's telephone call to the Commission (transcribed from tapes provided by the Commission) immediately following the error. We believe that review of this data will make clear that the error was inadvertent; there were no intentional misstatements made to the Commission; and there were no actionable misrepresentations made by Mr. Easton.

In the event you have any questions with respect to the referenced matter, kindly communicate directly with the undersigned. In the event that you do desire to communicate, please be mindful of the fact that, while the general counsel's office has confirmed that this is currently not a restricted proceeding, it could become restricted as of July 1, 1996, if petitions to deny are filed.

\ /

Thomas Guziere

Very truly your

Enclosure

cc: H. Davenport

P. Tenhula

TG: cms

Ms. Susan D. Easton, the beneficiary of the SDE Trust, which holds an interest in PCS 2000's general partner, is represented by separate counsel and nothing herein is presented for her behalf. Ms. Easton's property rights in the SDE Trust are legally separate from Mr. Easton under California law, and Mr. Easton holds no interest whatsoever in the Trust. We understand that counsel for Ms. Easton will, under separate cover, present evidence of her separate status.

FCC Officials Say Some Auction Bidders Were Subjects of Past Licensing Fraud Schemes

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FCC officials said they are aware that some companies participating in separate auctions of radio licenses have partners who have been involved in licensing fraud schemes. Although no formal complaints have been filed against specific bidders or investors, officials in the Enforcement Division of the Wireless Telecommunications Bureau confirmed that they have been reviewing documents submitted by those who were involved in previous schemes to acquire cellular and wireless cable TV licenses awarded by lottery. These individuals have resurfaced as partners or investors in companies that are bidding in the auction of multipoint distribution service licenses and the sale of personal communications service (PCS) licenses, FCC sources said.

Referring to the Form 175 auction applications that were filed last year, one official told TR, "There are some names that cause me concern because of past offenses." He said some participants were involved with application "mills"—firms that file numerous license applications for the same service area in the hope that they will win the lottery draw. For many years the FCC relied on lotteries and comparative hearings as a means of awarding radio licenses.

Before the "C" block PCS auction began, Sun Communications Partners of Pompano Beach, Fla., invited individuals to invest in one of five companies that planned to acquire PCS licenses. The companies were set up to attract investment from the Bell companies, and Sun's partners noted that potential bidders were seeking "Bell backing." Interested parties were invited to invest in the bidding entities through Sun's corporate partnership. "The minimum subscription is one unit or \$10,000," the marketing materials stated.

None of the five entities ever materialized as a PCS bidder, although the FCC announced last fall that it had formed an Anti-Fraud Task Force that would work with the Federal Trade Commission and the Securities and Exchange Commission to combat licensing fraud. Since then some auction observers have begun watching a company known as PCS 2000 L.P. Based in San Juan, Puerto Rico, the company has managed to attract some 1,641 individual investors, none of whom owns more than 3% of the partnership.

PSC 2000 President Javier O. Lamoso said he raised money to participate in the auction by selling subscription units (or shares) in his company for \$25,000 each. With this investment alone, PCS 2000 raised \$65 million to participate in the auction. It now is the top-ranked bidder in the auction that has been reserved for small businesses. After the auction's first week, PCS 2000 had bid nearly \$500 million on licenses—about half of the total bid so far.

Unlike other large PCS bidders, PCS 2000 has no big-name backers. "But its bidding strategy would suggest otherwise," one auction observer told TR. Others recall marketing materials circulated last year by PCS 2000, which invited interested parties to invest. The company said it would subtract \$5,000 from each \$25,000 investment to cover administrative costs. These costs were nonrefundable and necessary to cover the company's auction overhead, it said. "Even if PCS 2000 doesn't win a single license, the partnership will have made \$13 million on administrative costs," another source told TR.

Some auction participants have faulted the FCC's disclosure requirements as being too lenient. The Commission could have required auction participants to reveal all of their investors and affiliates before the auction started, one source told TR.

As the rules are written, however, bidders are required to fully disclose their corporate structure after the auction has concluded. "As a result, nobody knows what anybody else is doing in terms of bidding strategy," the source added. "PCS 2000 could be as legitimate an operation as any one of the

AFFIDAVIT

City of Washington

: SS

District of Columbia

I, Anthony T. Easton, having been first duly sworn, depose and state as follows:

- 1. The facts and circumstances surrounding the inadvertent bidding error by PCS 2000, L.P., in Round 11 of the Commission's Band C auction involved only the following: An overbid mistake of approximately \$186 million was made in one computer; that error was sent to another computer; was corrected in the first computer; but due to failure of cross checking procedures, that correction was not caught in the second computer; as a result, the second computer inadvertently transmitted the incorrect bid to the Commission.
- 2. Shortly after the inadvertent error was made, it came to my attention. I immediately called the Commission to report it. A transcript of that call, obtained from the FCC and transcribed by us is attached as Exhibit A. I believe the transcript to accurately reflect the conversation that transpired with one exception: The transcript omits the first portion of my conversation in which I explained the error to FCC personnel other than Louis Sigalas, the person I ultimately spoke to.
- 3. During the course of my telephone call with the Commission, I volunteered to provide a copy of the bid file which was displayed on my screen (the first computer), and the staff accepted my invitation. In order to comply with my offer, I printed a copy of the file and faxed it to the staff.
- 4. After I recognized that a bidding mistake of some type had been made, I undertook immediately an effort to understand exactly how that mistake could have been made. That process was hampered somewhat by the great volume of extraneous computer printouts that were generated during the normal course of the bidding process. This extraneous material was discarded. The process of discarding extraneous material was a normal course of conduct throughout the bidding process due to the reams of paper produced daily in this process.
- 5. In the process of reviewing records regarding the overbid, I had an opportunity to review my declaration of

January 26, 1996, in which I confirmed that the bidding error had occurred in our computer system and not the FCC's computer. A copy is attached as Exhibit B. I would like to clarify one statement included in the fourth paragraph of that declaration. Whereas there were problems with both the network print server and the fax server on the day of the bidding error, I cannot state with certainty the exact time that the errors occurred, although I do know that they occurred in the morning. I have this firm recollection because I personally spent approximately one hour attempting to fix the problem in our computer center.

- 6. In an intensive review of the bidding error conducted immediately after my initial phone call to the Commission, I concluded that the error was on our side and was not the fault of the Commission. I so informed the Commission in my January 26, 1996 declaration (Exhibit B) and have consistently maintained that position. Because we have acknowledged our full responsibility for the inadvertent error from that time, we have not deceived or misled the Commission in any way. We would have no reason to do so since the error was our fault and we have consistently so admitted in all pertinent communications.
- 14. The foregoing statements of fact are true and correct to the best of my own personal knowledge and belief, and are proffered in good faith.

Anthony T. Easton

Subscribed to and sworn to before me

this 3644 day of -/410, 1996

Notary Publication

My commission expires:

CATHERINE M. SEYMOUR
NOTARY PUBLIC DISTRICT OF COLUMBIA
My Commission Expires June 14, 2000

Auction 5.

Round 11 - PCS 2000

Tape 1 of 1.

Copy

BEGINNING OF TAPE FROM FCC

Tape starts with unidentified voice at FCC saying: "Line One", followed by:

FCC: This is Louis Sigalos, FCC, can I help you?

PCS2000: Hi, Louis, this is Terry Easton calling from PCS 2000.

FCC: Yes, sir.

PCS2000: We are just looking at the reports coming back from the FCC FTP Server.

FCC: Yes.

PCS2000: And we discovered that a bid that we made of eighteen million dollars for B three twenty four - it's eleven dollars a pop, its a minimum bid price - got recorded somehow at the Commission's computers as a hundred and eighty million dollars. Off by a factor of ten.

FCC: All right...ah...

PCS2000: This is a real problem, because the rec... we upload our files from our computer system here.

FCC: UmHum.

PCS2000: I've just checked our file. Our file we uploaded is correct.

FCC: The file that you uploaded is correct?

PCS2000: Yep.

FCC: I'm a little bit concerned, because I have yet to ever know that the system having input a bid, ah...

PCS2000: Do you want me to fax a file to you?

FCC: Yeah I have... yes.

PCS2000: I can fax you the files that we upload.

FCC: Did you get a bid confirmation sheet also?

PCS2000: No, we didn't get a bid confirmation sheet because we had a power problem at that point.

FCC: OK. And that can also, we, ah...

PCS2000: So what we did is (we've never had a problem like this), so what we did is we simply waited until the round was over and we pulled down the results from the FTP Server and much to our surprise we were in shock.

FCC: OK.

PCS2000: I am sure you can imagine that.

FCC: I can ,ha ha, yes I can actually imagine, ah, the, sha..,ha ha, shock...

PCS2000: It's clearly an error, clearly a mistake, and we need to deal with it.

FCC: Yes, why don't you fax over the information you have, and you don't have any bid confirmation sheet?

PCS2000: I have no bid confirmation sheet. Normally we get bid confirmation sheets back everyday, and we don't have any today because as I said we had a power problem in the building. A little bit of glitch in this particular machine. The UPS isn't hooked up right now.

FCC: OK Let me give you a fax number.

PCS2000: Hold on. Go ahead.

FCC: 2-0-2.

PCS2000: Yep.

FCC: 414-1273.

PCS2000: 414-1273?

FCC: Yes.

PCS2000: And your attention?

FCC: Yes.

PCS2000: What's your name, Louis?

FCC: Louis Sigalos. S-I-G-A-L-O-S.

PCS2000: OK, Louis, thanks.

FCC: And, um, just for your information, we can also. I'm gonna get our computer people to look at the key strokes in our place during your bid submission today.

PCS2000: Sure.

FCC: And we can confirm at our end.

PCS2000: Yeah, that's not a problem, because you record all that stuff. But, you know, we actually don't load key strokes, we just load a, we have a separate front end system running here.

FCC: OK, so you have a...

PCS2000: We have a massive computer facility of our own and we upload a file.

FCC: OK. Let me, ah, let's get that information and we will take it from there.

PCS2000: Thank you very much.

FCC: OK.

PCS2000: Ah, let me give you a call...do you need a call back number?

FCC: Well, you know, unfortunately, um, let me get your name.

PCS2000: Yeah. Terry Easton. Anthony T. Easton. E-A-S-T-O-N.

FCC: UmHum. And you are an authorized bidder?

PCS2000: I am an authorized bidder.

FCC: OK. OK. We have the contact phone number we have to utilize I can pull up, which I can pull up. Are you gonna be able to...

PCS2000: I'm not going to be at the contact phone.

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